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FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)
)
Implementation of Section 309(j)) PP Docket No. 93-253
of the Communications Act)
Competitive Bidding)

PETITION FOR RECONSIDERATION AND CLARIFICATION
OF THE
NATIONAL TELEPHONE COOPERATIVE ASSOCIATION

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TABLE OF CONTENTS

	PAGE
SUMMARY	ii
I. THE COMMISSION SHOULD ALTER ITS DEFINITION OF "RURAL TELEPHONE COMPANY" TO MAKE IT CONSISTENT WITH THE CONGRESSIONAL INTENT THAT LICENSES BE DISSEMINATED TO RURAL TELEPHONE COMPANIES AND THAT SERVICES BE DEPLOYED IN RURAL AREAS	2
A. The Commission should adopt a more flexible, targeted, and clear definition of rural telephone company that gives a preference to LECs that serve rural areas	2
B. The Commission should define the term "independently owned" to make it clear that small rural telephone companies affiliated with each other are not artificially excluded from preferences	5
II. THE COMMISSION FAILED TO PROVIDE FOR MEANINGFUL PREFERENCES THAT WILL ACCOMPLISH CONGRESSIONAL GOALS . . .	6
A. The Commission should provide for installment payments for rural telephone companies	7
B. The Commission should revise its rules to make bidding credits for rural telephone companies a meaningful preference	8
C. The Commission should avoid adopting an overly restrictive definition of "small business" in the generic rules	9
III. THE COMMISSION SHOULD FACILITATE RATHER THAN FRUSTRATE THE FORMATION OF CONSORTIA INVOLVING RURAL TELEPHONE COMPANIES	10
IV. CONCLUSION	12

SUMMARY

NTCA urges the Commission to reconsider and clarify its Order to assure that its competitive bidding rules do not frustrate Congress' express intent that "rural telephone companies" have the opportunity to obtain licenses at auction and that spectrum-based services are deployed in the rural areas of the country. The existing Order frustrates these purposes by imposing restrictive definitions of a "rural telephone company," and "small business," awarding a bidding credit which is rendered valueless by the imposition of accelerated build-out requirements, limiting preferences to this option alone, and prohibiting consortia or alliances which may be the most viable alternatives for bringing service to rural areas.

The Order and rules should be corrected to prevent these aberrational results. Specifically, NTCA's position is that a "rural telephone company" should be defined as a local exchange carrier having annual revenues of less than \$100,000 million or serving no more than 100,000 access lines. With respect to the "small business" definition, the Commission should define what a small business is in the context of the particular service for which spectrum is being auctioned. As to particular preferences, the Commission should reconsider the blanket denial of installment payments for all but small businesses and allow installment payments to assure this optional source of financing to promote deployment of services to rural areas. It should also

remove the accelerated build-out requirement as a condition to obtaining bidding credits. In addition rural telcos should not lose their preferences because they ally themselves with other rural telcos or designated entities in consortia or other arrangements. Finally, NTCA requests clarification of the meaning of "independently owned" language and other language related to affiliates to ensure that small rural telephone companies are not excluded from preferences merely because their corporate structure includes affiliates.

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The National Telephone Cooperative Association ("NTCA") pursuant to 47 C.F.R. § 1.429 requests reconsideration of the Second Report and Order, in the above proceeding, FCC 94-61, released April 20, 1994 ("Order"). NTCA is a national association of approximately 500 local exchange carriers ("LECs") providing telecommunications services to subscribers and interexchange carriers throughout rural and small-town America. Approximately half of NTCA's members are organized as non profit cooperatives under the laws of the various states where they operate. The remainder of NTCA's members are small locally-owned and operated commercial companies that have developed independently of the Bell System and are not owned by any of the regional holding companies or the GTE Corporation.

NTCA seeks clarification of portions of the Order that are ambiguous or contradictory and reconsideration of other portions that fail to give rural telephone companies a meaningful opportunity to obtain licenses in the competitive bidding

process. NTCA urges the Commission to reconsider the record in support of meaningful preferences for rural telephone companies and modify its generic rules to ensure that the Congressional purposes spelled out in Section 309(j) of the Communications Act are accomplished.

I. THE COMMISSION SHOULD ALTER ITS DEFINITION OF "RURAL TELEPHONE COMPANY" TO MAKE IT CONSISTENT WITH THE CONGRESSIONAL INTENT THAT LICENSES BE DISSEMINATED TO RURAL TELEPHONE COMPANIES AND THAT SERVICES BE DEPLOYED IN RURAL AREAS.

- A. The Commission should adopt a more flexible, targeted, and clear definition of rural telephone company that gives a preference to LECs that serve rural areas.

The Commission's Order states that a rural telephone company must not have more than "50,000 access lines, including all affiliates" to be eligible for a preference.¹ In the Appendix to the Order, the Commission defines a rural telephone company as one that "is an independently owned and operated local exchange carrier with 50,000 access lines or fewer, and serving communities with 10,000 or fewer inhabitants."² As an initial matter, NTCA suggests that the Commission clarify the meaning of 47 C.F.R. § 1.2110(b)(3). This rule makes no reference to licensed areas and is therefore not clear in indicating whether a rural telephone company is a rural telephone company for purposes of the generic rules only when it applies for a license congruent to its wireline licensed service area. This appears to be the intent of ¶ 282 of the Order which refers to "communities with no

¹ At ¶ 282.

² Order, Appendix, 47 C.F.R. § 1.2110(b)(3).

more than 10,000 inhabitants in the licensed area." Likewise, that appears to be the intention of 47 C.F.R. § 1.2110(e) which provides for bidding credits for rural telephone companies and makes the credit available "for licenses in rural telephone company service areas." NTCA urges the Commission to clarify or make these provisions consistent.

In prior comments in this docket, NTCA asked that the Commission define "rural telephone company" so as to provide "rural telephone company" preferences to local exchange carriers that have no more than 50,000 access lines or that serve places with no more than 10,000 inhabitants.³ NTCA explained that a flexible approach to defining a rural telephone company on the basis of the size of the company or the rurality of its wireline service area is best suited to achieve the Congressional purposes in Section 309(j) of promoting economic opportunity for rural companies and other designated entities,⁴ and to "foster[ing] the development and rapid deployment of new technologies, products, and services for the benefit of the public, including those residing in rural areas"⁵ The Commission's Order fails to satisfy the dual purposes in 309(j).⁶ It also

³ NTCA Reply in this docket at 9-10.

⁴ Subsection 309(j)(3)(B) of the Communications Act.

⁵ Subsection 309(j)(3)(A) of the Communications Act.

⁶ One of the points that NTCA made in its Reply Comments was that partitioning of the BTAs or MTAs will be necessary to promote service to rural areas. The Commission did not address this point. NTCA will not elaborate here because it has filed a
(continued...)

specifically fails to address NTCA's comments or the requests of other parties for a definition that provides an alternative test based on rurality or access lines. The Commission should provide for and at least explain how it will achieve the Congressional intent through other means if it does not adopt NTCA's proposed definition making access lines or service areas the qualifying factors for "rural telephone company" preferential treatment.

NTCA is aware that other parties have proposed that a rural telephone company be defined as one with annual revenues of less than \$100,000 million or which serves no more than 100,000 access lines. NTCA supports this definition which it believes would satisfy the Congressional intent that licenses be disseminated to a wide variety of applicants and that service is deployed expeditiously in rural areas. NTCA now believes this definition of a rural telephone company has the added benefit of being easier to administer because of its simplicity and the Commission's familiarity with the more straightforward definition. The definition avoids some of the pitfalls associated with other tests. This broader definition will identify companies that require preferences to meaningfully

⁶(...continued)
Petition for Reconsideration in In the Matter of the Commission's Rules to Establish New Personal Communications Services addressing partitioning in Gen. Docket No. 90-314. Nonetheless, it is necessary to point out that rural areas will benefit by incentives and/or requirements that would allow auction winners to partition BTAs and MTAs so that rural telephone companies can obtain licenses to serve partial BTAs or MTAs.

compete for the spectrum required to bring spectrum-based emerging technologies to rural areas.

- B. The Commission should define the term "independently owned" to make it clear that small rural telephone companies affiliated with each other are not artificially excluded from preferences.

It is not clear what the Commission intends by use of the term "independently owned" in 47 C.F.R. § 1.2110(b)(3). That section states that a rural telephone company is an "independently owned and operated" LEC with 50,000 access lines or fewer and serving communities with 10,000 or fewer inhabitants. The text of the Order states that a LEC must not have more than "50,000 access lines, including all affiliates." Since the Commission refers to "affiliates" in describing how it will apply the 50,000 threshold, it appears that the Commission did not intend to exclude LECs merely because they were owned by or own other corporate entities.⁷ Clarification is required, however, to establish the parameters of the types of affiliations that will disqualify LECS. As written, it is not clear whether a wholly or partially owned subsidiary, a partner, joint venturer or an applicant operationally controlled by another entity and satisfying the 50,000 access line threshold test qualifies for the preference. It is also not clear whether telephone company

⁷ One possible definition of "independently owned" which could be adapted for this proceeding is that of an "Independent Operating Company," taken from the May 4, 1983. Consent Decree between the United States of America and GTE Corporation in Civil Action No. 83-1298, U.S.D.C. D.C. The definition reads, "Independent operating company means . . . any carrier, other than AT&T or any BOC or GTOC, providing exchange telecommunications and exchange access service."

owned or controlled affiliates that together serve more than 50,000 but no place greater than 10,000 qualify as rural telephone companies. In addition, as explained further below, it is not clear whether consortia of LECS, each of whom individually qualify as rural telcos, are disqualified when they apply as a consortia even if the areas they seek to serve are within their wireline service areas.

Many truly small telephone companies are organized as holding companies or under corporate structures which encompass wholly or partially owned subsidiaries and affiliates. NTCA believes the Commission did not intend to exclude small, rural telcos just because of their corporate organizational structure. Thus it urges the Commission to modify its Order to remedy the apparently unintended effect of conflicting and unclear statements.

II. THE COMMISSION FAILED TO PROVIDE FOR MEANINGFUL PREFERENCES THAT WILL ACCOMPLISH CONGRESSIONAL GOALS.

As stated in I (A) above, Congress expressed a dual purpose which requires consideration of a range of preferences to assure the dissemination of licenses to rural companies and the deployment of new technologies in rural areas. These preferences must address economic factors such as the availability of financing which might prevent rural telephone companies from obtaining licenses at auction. The record before the Commission indicates that all but the large dominant communication service providers and others with "deep pockets" will have difficulty obtaining the financing needed to bid for and build the large

Basic Trading Areas (BTAs) and Major Trading Areas (MTAs) the Commission intends to license in broadband personal communication services (PCS). In testimony before the Commission's PCS Task Force, it was suggested that the Commission could further the Congressional goals with respect to designated entities by keeping the cost of entry as low as possible.⁸ NTCA agrees with this suggestion and urges the Commission to modify its decision to create meaningful preferences that will in fact keep the cost of entry low and facilitate the acquisition of licenses by rural telephone companies and the delivery of services to rural areas.

- A. The Commission should provide for installment payments for rural telephone companies.

The Commission's rules limit the use of installment payments to small businesses. Thus rural telephone companies would be eligible for installment payments only if they meet the Commission's stringent "small business" definition, i.e., \$ 6 million net worth and no more than \$2 million in annual profits each year for the previous two years, after federal income taxes (excluding any carry over losses). This definition has a particularly harsh and punitive effect on rural telephone companies. The effect is harsh because the business of providing wireline service is capital intensive, particularly in rural areas; it is punitive because the low net worth threshold punishes rural telephone companies that have made the necessary

⁸ Testimony of Paul Rissman, Vice President, Alliance Capital Management, L.P., at p. 238, 1.21-22 of Transcript of April 11, 1994, Hearing before PCS Task Force.

investment to bring telephone service to high cost areas thereby promoting the Universal Service goals embodied in the Communications Act. Rural telephone companies should have the benefit of installment payments regardless of their qualification as small businesses. Installment payments represent a form of optional financing that can substitute for the financing that the record shows may otherwise be unavailable for rural telephone companies.

- B. The Commission should revise its rules to make bidding credits for rural telephone companies a meaningful preference.

The Commission has nullified the potential benefit of bidding credits for rural telephone companies by tying the credits to an accelerated build-out requirement which translates into an added financial commitment. In imposing the added build-out requirement, the Commission accords no preference as it gives with one hand and takes away with another. NTCA recommends that the Commission retain the bidding credit preference but remove the accelerated build-out requirement.

The current provision to tie bidding credits to accelerated and more extensive commitments to build out represents a counter-productive stipulation that is fatal to the ostensible goal of bringing PCS to rural areas. Rural areas already present formidable service coverage obstacles. The build-out requirements already present an overwhelming challenge to a small entity attempting to provide extensive coverage of a rural area. Making these already imposing requirements even more onerous for

the small and rural entities would make an already tenuous opportunity vanish. Any potential bidding credit value afforded would be more than lost by the competitive disadvantage and service coverage hurdle placed in front of the preference entity.

Therefore, bidding credits should be available to all preference entities. The value of the bidding credit should be meaningfully high. NTCA believes a 50% credit is reasonable. Finally, the bidding credit should not be contingent on the satisfaction of more onerous service requirements.

- C. The Commission should avoid adopting an overly restrictive definition of "small business" in the generic rules.

NTCA believes the adoption of an overly restrictive small business definition in the generic rules proceeding will unduly curb the Commission's ability to adapt preferences to the characteristics of future and particular services for which it will auction spectrum. The small business threshold established in the Order illustrates this point with respect to broadband PCS services. The \$6 million net worth threshold is way too low to reflect the fact that the provision of broadband telecommunications services such as PCS will be a capital intensive business. The size limitation adopted in the Order will include only companies that do not possess the financial strength to win the auction, build the system, and operate the service even on a BTA basis. The limitation also does not take account of the fact that rural telephone companies are already in the capital intensive business of providing telecommunications

services to sparsely populated and high cost areas and may have a high net worth precisely because they are providing the type of service the public needs and requires. As a result, many of these companies fail the adopted small business test even though they serve very few subscribers, have very few employees and are among the entities most capable of bringing the new services to market. In fact, 241 of 899 Rural Electrification Administration (REA) borrowers reporting in 1992 failed the \$6 million net worth test. REA data also shows that only 18 of the 241 companies had 50,000 or more subscribers while 126 had 10,000 or fewer subscribers.⁹

NTCA believes the public interest will be better served and the goals of Section 309 (j) more readily achieved if the Commission adapts a more flexible approach and determine what a "small business" is in conjunction with the various services that are being auctioned. This will give the Commission a flexibility similar to the Small Business Administration approach which utilizes a range of definitions in determining when particular businesses are eligible for programs administered by the SBA.

III. THE COMMISSION SHOULD FACILITATE RATHER THAN FRUSTRATE THE FORMATION OF CONSORTIA INVOLVING RURAL TELEPHONE COMPANIES.

The Commission Order makes conflicting remarks that praise but defeat opportunities for consortia of rural telephone companies by refusing to accord preferences to consortia of

⁹ See, NTCA May 6, 1994, Ex Parte presentation to PCS Task Force; (Chart of REA Borrowers Failing SBA Parameters (Listed with Subscribers)).

eligible designated entities that "when combined result in a new entity that does not meet [its] definitions."¹⁰ The Commission's goals and its rules are not consistent. On the one hand the Commission states, "[w]e seek to encourage designated entities to raise capital by selling less than controlling interest in their companies."¹¹ It argues against itself, however, in conflicting pronouncements and the avoidance of clear rules encouraging consortia. It states variously: "If applicants made up of a number of entities were allowed special treatment, the economic opportunity for individual designated entities would be diluted . . . allowing applicants to be formed from a combination of eligible and ineligible entities would invite attempts to abuse"¹² and "[w]e reject proposals to accord preferences to consortia of otherwise eligible designated entities that, when combined, result in a new entity that does not meet our definitions."¹³ These latter two statements contradicting the statement about attempts to "encourage" consortia and the absence of rules to that effect reflect unfounded fears that consortia of designated entities including rural telephone companies will form alliances aimed at depriving individual designated entities of licensing opportunities. There is no record evidence that this fear is rational with respect to

¹⁰ Order at ¶ 286.

¹¹ Order at ¶ 278.

¹² Order at ¶ 287.

¹³ Order at ¶ 286.

rural telephone companies. As many parties have commented on the record, the deployment of broadband PCS in particular will require extensive financial resources, a fact that will obviate the danger that alliances will deprive individual entities of large BTA licenses they can only realistically bid on in consortia or partnerships.

The Commission's unwarranted fear and rule that consortia, joint ventures, unincorporated associations of entities or partnerships may not avail themselves of preferences unless the entities themselves qualify as designated entities has also introduced an anomaly that has the effect of preventing alliances among rural telephone companies that together have more than 50,000 access lines but allowing rural telephone companies to retain preferences when forming alliances with the likes of a General Motors that could hold a 49% interest in a license. This result is not rational. The Congressional intent and the Commission's goals can best be achieved by alliances among rural telephone companies which have telecommunications expertise and a history of service to rural areas. NTCA urges the Commission to reconsider its rules relating to consortia to allow for the formation of consortia of small companies that can effectively work together and pool resources to provide viable spectrum based services and deliver these services to rural areas.

IV. CONCLUSION

For the above stated reasons, NTCA urges the Commission to reconsider and clarify its Order in the following respects: (1)

define "rural telephone company" to expand the number of LECs eligible for preference to include all LECs that have annual revenues of less than \$100,000 million or that serve no more than 100,000 access lines; (2) clarify that rural telephone companies affiliated with each other are eligible for preferences; (3) provide for installment payments for rural telephone companies; (4) revise its rules on bidding credits for rural telephone companies to eliminate penalties which nullify the effect of the preference; (5) define a "small business" to reflect the characteristics of the particular service; and (6) formulate rules that encourage the formation of consortia and other alliances of rural telephone companies without penalizing companies for allying themselves with each other.

Respectfully submitted,

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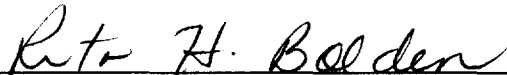
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June 3, 1994

CERTIFICATE OF SERVICE

I, Rita H. Bolden, certify that a copy of the foregoing Petition for Reconsideration and Clarification of the National Telephone Cooperative Association in PP Docket No. 93-253 was served on this 3rd day of June 1994, by first-class, U.S. Mail, postage prepaid, to the following persons on the attached list:


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